Supreme Court, U.S.
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No. 92-5129 (4)

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN L. SULLIVAN,
Petitioner

vs.

STATE OF LOUISIANA,
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of the State of Louisiana

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This case squarely presents the issue of whether a constitutionally deficient reasonable doubt instruction is subject to harmless error analysis. The State of Louisiana does not deny that decisions of the state courts and lower federal courts conflict on this issue. Nor does the state respond to petitioner's argument that harmless error review of the erroneous reasonable doubt instruction deprives petitioner of his Sixth Amendment right to a trial by jury. Rather than directly confronting the issue, the state attempts to focus on a footnote discussion

concerning the proper phrasing of the standard for determining erroneous jury instructions. This discussion has no bearing on the question presented here, whether an admittedly erroneous reasonable doubt instruction may be harmless.1/

There can be no doubt that the instruction on reasonable doubt in this case was erroneous. When petitioner argued below that his trial was tainted by a constitutionally erroneous reasonable doubt instruction prohibited by Cage, the state conceded the point in its brief on direct appeal. The Louisiana Supreme Court, reviewing the instruction after the issuance of McGuire, unqualifiedly held that the instruction was constitutionally improper. See Louisiana v. Sullivan, 596 So. 2d 177, 185 (La. 1992). The state did not petition or cross-petition this Court for review, nor even petition the Louisiana Supreme Court for rehearing, on the basis that an allegedly erroneous standard was used in analyzing petitioner's reasonable doubt instruction, or that there was any other argument that the instruction was not constitutionally improper. More to the point, the instruction in this case is essentially the same as that found erroneous by a unanimous Court in Cage. There is, therefore, no question whether giving the instruction was error.

1/ Louisiana reads entirely too much into footnote 4 of Estelle v. McGuire, 112 S. Ct. 475 (1991). In that footnote, this Court explains that the "different phrasings" in its recent cases evaluating jury instructions "might be read as endorsing a different standard," and merely disapproves of the specific language used to describe the standard in Cage v. Louisiana, 111 S. Ct. 328 (1990) (per curiam), and Yates v. Evatt, 111 S. Ct. 1884 (1991). McGuire, 112 S. Ct. at 482 n.4. Nothing in the footnote or in the rest of the Court's opinion in McGuire, however, questions in any way this Court's unanimous holding that the reasonable doubt instruction used in Cage--and also here--was unconstitutional.

The state's McGuire argument is merely a red herring, attempting to distract the Court from the sole question squarely presented in this case: given a constitutionally deficient reasonable doubt instruction, may the error ever be deemed harmless? In that respect, this case is similar in procedural posture to the situation this Court faced in Yates; there, the state supreme court had conceded that the instructions were unconstitutional and the respondent did not challenge that conclusion. Yates, 111 S. Ct. at 1890. Accordingly, this Court considered only whether the erroneous instructions there at issue could be subject to harmless error analysis under Chapman. The reasonable doubt instruction here, already held erroneous by this Court in Cage and by the Louisiana Supreme Court below, calls for a similarly focused inquiry.

Once the focus is centered on the pending issue, Louisiana's only argument goes to the merits of the question presented: it does not question the importance of having it answered. The state argues that an unconstitutional reasonable doubt instruction, like most errors occurring during criminal trials, is subject to harmless error analysis as set forth in Chapman v. California, 386 U.S. 18 (1967). It bases this contention on this Court's decisions that various other erroneous jury instructions are "trial" errors subject to harmless error analysis. This conclusion, however, ignores this Court's language in Jackson v. Virginia, 443 U.S. 307 (1979), and other cases that a jury instruction on the reasonable doubt standard is "an essential of the due process guarantee," the deprivation of which "can never be harmless error." Id. at 316, 320 n.14. Louisiana also fails to consider the unique nature of the reasonable

doubt instruction, which differs from most other jury instructions because it affects the framework of the trial itself by providing the jury the standard with which to evaluate the evidence. As such it is a structural element, not subject to harmless error analysis under Arizona v. Fulminante, 111 S. Ct. 1246, 1265 (1991). The instruction also provides an essential safeguard so that the trial can "reliably serve its function as a vehicle for determination of guilt or innocence," id. (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986)), and thereby "command the respect and confidence of the community." In Re Winship, 397 U.S. 358, 364 (1975). As this Court pointed out in Rose, any error affecting the fundamental fairness of a trial is not subject to harmless error analysis. Rose, 478 U.S. at 577.2/

The application of harmless error analysis to an unconstitutional reasonable doubt instruction also violates petitioner's Sixth Amendment right to a jury trial, a

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2/ Louisiana does not address petitioner's argument that the Louisiana Supreme Court did not actually apply the Chapman test. As Justice Dennis observed in dissent, see 596 So. 2d at 193 (Dennis, J., dissenting), the court applied what amounts to a Jackson v. Virginia sufficiency of the evidence test, a test which is much more deferential to the state. See 443 U.S. at 319. If the court had applied the proper test, it could not have found the error harmless. Louisiana does not directly dispute petitioner's statement of the exculpatory facts in this case, which it had an obligation to do under Supreme Court Rule 15.1 if it perceived any misstatements. The state's case was based on the testimony of a fully immunized accomplice and an impeached eyewitness who could not make an identification after the crime and who admitted she did not see the shooting. The only physical evidence was circumstantial and did not tie the petitioner to the scene of the crime. It is especially in these types of cases, where identity and credibility issues predominate, that an erroneous reasonable doubt instruction cannot be harmless. See Monk v. Zelez, 901 F.2d 885 (10th Cir. 1990) (per curiam); Lanigan v. Maloney, 853 F.2d 40 (1st Cir. 1988); Massachusetts v. Garcia, 399 N.E.2d 460 (Mass. 1980); United States v. Pinkney, 551 F.2d 1241 (D.C. Cir. 1976). An examination of the record leaves room for reasonable doubt; the erroneous instruction was not harmless here.

point the state does not even contest in its response. The constitutional right to a trial by jury reflects a fundamental decision about the state's exercise of power. For an appellate court to assess harmless error, it would have to make post hoc determinations of credibility and fact. This would usurp the factfinding function allocated solely to the jury. As Justice Scalia points out in his concurring opinion in Carella v. California, 491 U.S. 263, 267 (1989), "the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials." Id. at 269 (Scalia, J., concurring) (quoting Bollenbach v. United States, 326 U.S. 607, 614 (1946)).

The state also does not dispute that this Court's intervention is necessary to resolve a conflict in the other state courts and lower federal courts. As explained in petitioner's brief, several states and circuits have addressed this issue and the jurisdictions are split as to whether harmless error applies. Indeed, since petitioner prepared his petition for certiorari, North Carolina has joined the ranks of those states applying harmless error analysis to an erroneous reasonable doubt instruction. North Carolina v. Montgomery, 417 S.E.2d 742, 751 (N.C. 1992). Both defendants and prosecutors have previously petitioned the Court for review on this recurring issue concerning the scope of an accused's constitutional rights, which is ripe for review and definitive answer now.

Louisiana's final argument against granting review, the "floodgates" contention, is also unavailing. As this Court is aware, petitioner cannot be required to pay the price for the state's failure to provide a fair trial that comports with the

Constitution's demands. Furthermore, since this is a case in which petitioner may still be sentenced to death, all possible doubts should be resolved in his favor. Satterwhite v. Texas, 486 U.S. 249, 258 (1988). If there are indeed, as Louisiana suggests, several states that have been utilizing unconstitutional jury instructions on reasonable doubt, this Court, in the interests of judicial economy and uniformity, should take this opportunity to resolve this important issue now, rather than allowing it to linger without definitive answer.

In any event, the state's concerns are overstated. The number of defendants who would be affected by a decision by this Court is limited by Louisiana's contemporaneous objection rule[3/] and retroactivity principles.[4/] Moreover, as Justice Dennis points out in his dissenting opinion below, the use of this instruction has not been pervasive in Louisiana since similar instructions were held unconstitutional in the past.[5/] 596 So. 2d at 193 (Dennis, J., dissenting) ("only *a few* [judges] mistakenly or obstinately" have used this instruction (emphasis in original)). In raising its "fairness" concerns, Louisiana certainly could not have intended to imply that, by repeatedly using this unconstitutional instruction, its trial courts have insulated themselves from this Court's review.

3/ Louisiana courts will not review a jury instruction error on direct appeal unless a contemporaneous objection was made at trial or unless the case is a death penalty case. La. Code Crim. Proc. Ann. art. 905.9 (West 1976).

4/ Petitioner's case is still on direct review. See Petition for Certiorari at 4 n.3, 12 n.9.

5/ See, e.g., Louisiana v. Vessell, 450 So. 2d 938 (La. 1984); Louisiana v. McDaniel, 410 So. 2d 938 (La. 1982); Louisiana v. Mack, 403 So. 2d 8 (La. 1981).

This case cleanly presents the issue of whether a constitutionally deficient reasonable doubt instruction is subject to harmless error analysis. The right to be found guilty only if the jury so finds beyond a reasonable doubt is a fundamental constitutional safeguard in the structure of a criminal trial and, as such, its deprivation should not be subjected to harmless error analysis under this Court's opinions. Petitioner urges the Court to grant the Writ of Certiorari.

Dated: October 1, 1992

Respectfully submitted,

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STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

Mark P. Lindberg, being first duly sworn on oath, deposes and states as follows:

1. That on the 1st day of October, 1992, he did send by United States mail, pursuant to Supreme Court Rule 29.3, an envelope properly sealed and with first class postage prepaid to:

Jack Peebles, Esq.
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one copy of Petitioner John L. Sullivan's Reply Brief in Support of Petition For A Writ Of Certiorari.

2. All parties required to be served have been served.

Mark P. Lindberg

Subscribed and sworn to before me
this 1st day of October, 1992.

Joan C Mocnik
Notary Public

My Commission Expires
August 31, 1993

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Re: State of Louisiana vs. John L. Sullivan
No. 92-5129, October Term, 1992

Dear Clerk:

Enclosed is one copy of the Petitioner's Reply Brief in Support of Petition for A Writ of *Certiorari* in the above matter.

One copy of this document have been served upon Jack Peebles, counsel for respondent. Also enclosed is a certificate of service pursuant to Supreme Court Rule 29.5(c).

Thank you very much for your assistance with this matter.

Sincerely,

Mark P. Lindberg

Mark P. Lindberg

MPL:ps
Enclosures
cc: Jack Peebles, Esq.

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